Supreme Court, U.S.
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Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

CECIL WILLIAM COX,
Petitioner,

v.

MICHAEL W. MOORE, as Secretary of the
DEPARTMENT OF CORRECTIONS, State of Florida,
Respondent.

On Petition for Writ of Certiorari
to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

1. Whether 28 U.S.C. § 2254(d)(1)[1] requires a showing of "essentially the same facts" and issues before a federal court may adjudicate the merits of the claim adjudicated in state court.

2. Whether in the context of a challenge to a guilty plea by a state prisoner must the state court specifically reject an opinion of the Supreme Court of the United States in order to justify granting the writ.

3. Whether the state court conclusion that a Florida statute, which was established to alleviate overcrowded prison conditions by providing provisional gaintime awards, was merely procedural, and, therefore, gaintime awards could be granted or taken away without *ex post facto* restrictions was

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[1](d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

contrary to or involved an unreasonable application of existing United States Supreme Court precedent, *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

4. Whether, like regular gaintime, prison overcrowding gaintime could constitute a part of a sentence as to constitute a significant factor for both a defendant entering into a plea bargain and the trial court's calculation of the sentence to be imposed under *Lynce v. Mathis*, 519 U.S. 433, 445-46, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997), quoting *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

5. Whether trial counsel was constitutionally ineffective for advising the petitioner that because of entitlement to overcrowding gaintime credit, petitioner would serve no more than twenty percent of an agreed sentence, upon which advice the defendant/petitioner relied; but for the advice of counsel, petitioner would have persisted in his not guilty plea and insisted on trial by jury.

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

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CECIL WILLIAM COX,
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DEPARTMENT OF CORRECTIONS, State of Florida,
Respondent.

On Petition for Writ of Certiorari
to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

The Petitioner, CECIL WILLIAM COX, respectfully prays the Court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on 28 August 2000.

D. CITATIONS TO OPINIONS BELOW

The opinion of the First District Court of Appeal of Florida is reported as *Cox v. State*, 650 So.2d 634 (Fla. 1st DCA 1995), and is reproduced in the Appendix (hereinafter "A"). (A-23). Rehearing was denied on 14 March 1995. After state exhaustion the Eleventh Circuit Court of Appeals affirmed in an unpublished opinion filed on 28 August 2000 which is reproduced in the appendix. (A-69)

E. BASIS FOR JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1), to review the final judgment of the United States Court of Appeals for the Eleventh Circuit rendered on 28 August 2000. (A-69).

F. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitutional Provisions

The case requires interpretation and application of Amendment VI and Article I, §10 of the Constitution of the United States, which provides, in pertinent part:

> Amendment VI:
>
> and no state shall … pass any … ex post facto Law ….
>
> Article I, Section 10:
>
> In all criminal prosecutions, the accused shall enjoy the right to … have the assistance of counsel for his defence.

2. Statutory Provisions

> 28 U.S.C. § 2254:
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was

> contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

G. STATEMENT OF THE CASE

By way of a state motion for post conviction relief authorized under Florida Rules of Criminal Procedure 3.850, filed on 29 January 1993, Petitioner first raised the claims that his guilty plea was involuntary because his counsel advised him that he was eligible for Florida's gaintime provisional credits which would reduce his forty-year cap to eight to ten years and counsel was constitutionally deficient for such positive misadvice. After an evidentiary hearing, the motion was denied in state court on 25 October 1993. (A-1-22).

The state trial court passed on the questions raised that "[p]rovisional release credits, or other similar statutory means designed to alleviate the administration crisis created by prison overcrowding are not proper factors upon which a plea bargain and sentence may be predicated." (A-9). The state court

continued that "[a] lawyer's opinion or advice concerning such procedural matters cannot, as a matter of law, be a legal basis upon which the validity of a plea may be predicated." (A-10). Second, the state court held that a failure of counsel to inform a defendant of the possible collateral consequences of a plea will not support a motion to withdraw a plea. (A-10). Third, the state court found that if Mr. Cox rejected the plea offer, he ran the risk of a life sentence with a minimum mandatory 25 year sentence. (A-17). The First District Court of Appeal affirmed on 26 January 1995, *Cox v. State*, 650 So.2d 634 (Fla. 1st DCA 1995), rehearing denied 14 March 1995, in a per curiam opinion which cited three cases without further discussion. (A-23).

On 15 October 1996 Petitioner Cox filed his Petition for Writ of Habeas Corpus by a Person in State Custody supported by a memorandum of law which briefed the issues of ineffective assistance and voluntariness of the plea under *Hill v. Lockhart* [474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d

203 (1985)] standards. The Response to Petition for Writ of Habeas Corpus filed by Respondent argued that the petition did not show the state court decision to be a repudiation or rejection of the Sixth Amendment or controlling Supreme Court decisional law as required under the Antiterrorism Effective Death Penalty Act (AEDPA). Petitioner was granted leave to respond and briefed the issue that the petition was aimed at the state court conclusions which conclusions were contrary to cited United States Supreme Court decisions which specifically voided previous attempts by the State of Florida to retroactively cancel provisional early release credits awarded to state prisoners citing *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

The United States Magistrate concluded in a Report and Recommendation (R&R) issued on 30 November 1998, that even though the advice by counsel "was wrong" (A-28), it did not amount to ineffective assistance of counsel largely due to a failure to establish prejudice. (A-28).

The United States District Court judge for the Tallahassee Division of the Northern District of Florida adopted the R&R with additional comments; most significantly that the "But for the Department's *ex post facto* application of a subsequently enacted statute, the lawyer's advice was essentially correct." (A-64). The district court judge denied the petition for writ of habeas corpus on 24 March 1999, and denied a certificate of appealability.

A motion for certificate of appealability was denied by the district court on 25 May 1999. The Eleventh Circuit Court of Appeals granted the certificate of appealability 02 December and the appeal proceeded on the merits through the Court of Appeals pursuant to 28 U.S.C. § 2253.

The Eleventh Circuit in an unpublished opinion issued on 28 August 2000 addressed the following issues: (1) whether the state court's order denying Petitioner Cox's postconviction relief was "contrary to" clearly established federal law as established by the United States Supreme Court; (2) whether

the state court order denying Petitioner Cox's postconviction relief unreasonably applied clearly established federal law as established by the United States Supreme Court; and (3) whether Petitioner Cox's guilty plea was voluntary, knowing and intelligent because it was based upon the misadvice of counsel as to the total length of time Petitioner Cox would have to serve under a 40-year sentence. The Eleventh Circuit adopted the Report and Recommendation and the order and judgment of the district court in affirming the decision. (A-64).

The Supreme Court of the United States is requested to exercise its discretionary jurisdiction to address the questions presented.

Petitioner Cecil Cox filed his Petition for Writ of Habeas Corpus By a Person in State Custody on 15 October 1996 (Doc. 2), which alleged that Mr. Cox was denied the effective assistance of trial counsel due to erroneous advice concerning the length of sentence Petitioner Cox would serve if he accepted a plea offer to second-degree murder. Mr. Cox

was charged with first-degree murder for an incident that occurred on 30 September 1989. (Petition, page 2). Mr. Cox initially pled not guilty. Pretrial, the state agreed not to seek the death penalty, and Mr. Cox agreed to have the case tried before a six-person jury. On 06 August 1990, the morning the trial was set to begin, Mr. Cox entered a plea of *nolo contendere* to a second-degree murder charge and waived his right to trial. (Memorandum, page 2). Indisputably defense counsel advised Mr. Cox that due to the overcrowding provisional gaintime scheme in effect in Florida, Petitioner would in no event serve more than eight to ten years. The plea was accepted by the trial court, and Mr. Cox was adjudicated guilty of second-degree murder on 06 August 1990. (Memorandum, page 3). On 26 October 1990, Mr. Cox was sentenced to 40 years imprisonment. (Appendix in Support of Petition, page 15).

Mr. Cox was represented by two lawyers during the proceeding, an assistant public defender, and a private attorney retained by Petitioner's family, who practiced in Alabama.

Both lawyers argued at length with Petitioner Cox that he should accept the plea (Appendix in Support of Petition, page 126), because with the application of provisional credits,[2] Mr. Cox would serve only 8 to 10 years of a 40-year sentence. (Appendix in Support of Petition, page 32, 35;. 151-152). The only thing counsel and petitioner were discussing before the plea was the amount of time that Mr. Cox would serve on a 40-year sentence. (Appendix in Support of Petition, page 79). The assistant public defender advised petitioner that he would be "entitled," not merely eligible, to provisional credits. (Appendix in Support of Petition, page 31). The gaintime to which counsel advised Petitioner would be entitled was the "the key" reason that Petitioner Cox ultimately decided to accept the plea. (Appendix in Support of Petition, page 75). Based on the calculations made by counsel that Petitioner Cox would serve no more then eight to ten years, both attorneys recommended

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[2]Provisional credits were one of a myriad of early release provisions employed by the Florida Department of Corrections. *See Lynce v. Mathis*, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997).

that Petitioner Cox accept the plea agreement. (Appendix in Support of Petition, page 110). Alabama Attorney Christ further testified that without the representation that Mr. Cox would only serve approximately eight years, he "would not have even recommended it to him as counsel." (Appendix in Support of Petition, page 110).

Subsequent to the issuance of the R&R by the United States magistrate, the Supreme Court of Florida issued four opinions, which clarified state law pertinent to Petitioner Cox's petition. *Thomas v. Singletary*, 729 So.2d 369 (Fla. 1998); *Meola v. Department of Corrections*, 732 So.2d 1029 (Fla. 1998); *State v. Lancaster*, 731 So.2d 122 (Fla. 1998); *Gomez v. Singletary*, 733 So.2d 499 (Fla. 1998). Mr. Cox's position was that *Gomez* and *Lynce v. Mathis*, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997),[3] clarified an essential holding of the state court's order denying Mr. Cox postconviction relief was

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[3]Which quoted *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) extensively.

erroneous in that the holding was "contrary to" clearly established federal law determined by the United States Supreme Court.

In deciding the case, the magistrate and district court opined that the facts presented were not "essentially the same" as those presented in *Hill*[4] and *Strickland*[5] (A-45) because *Hill* was decided upon the failure of the petitioner to allege that he would have go to trial absent the erroneous advice of counsel. "That factor is absent from the case at bar, and thus the facts are not essentially the same." (A-47). The district court adopted the R&R (A-64). The Eleventh Circuit Court of Appeals explicitly referred to the reasoned opinion of the magistrate (A-71) in denying relief.

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[4]*Hill v. Lockhart*, 467 U.S. 52, 106 S.Ct. 355, 88 L.Ed.2d 203 (1985).

[5]*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

H. REASONS FOR GRANTING THE WRIT

1. The "essentially the same facts" standard.

The "essentially the same facts" standard used by the magistrate (A-45) is a theory of exhaustion, *Foster v. Delo*, 11 F.3d 1451 (8th Cir. 1993), which has been rejected by the Supreme Court, *citing Duncan v. Henry*, 513 U.S. 364, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995). *See Johnson v. Zenon*, 88 F.3d 828 (9th Cir. 1996). The decision below which relied on the requirement of "essentially the same facts" (A-45) before federal constitutional review was therefore in conflict with United States Supreme Court precedent and other circuits, specifically *MacFarlane v. Walter*, 179 F.3d 1131 (9th Cir. 1999), *vacated and remanded Lehman v. MacFarlane*, — U.S. —, 120 S.Ct. 1959, 146 L.Ed.2d 790 (2000), *dismissed as moot MacFarlane v. Walter*, 216 F.3d 881 (9th Cir. 2000).

2. Specific rejection of Supreme Court decision.

The holding below which requires essentially the same issues of law (A-47) places the Eleventh Circuit in conflict with

other circuits on the same issue of law. *Nevers v. Killinger*, 169 F.3d 352 (6th Cir. 1999), following *O'Brien v. Dubois*, 145 F.3d 16 (1st Cir. 1998), [which criticized the Fifth and Eleventh Circuits for bifurcating "questions of law" and "mixed questions of law and fact" and noted a habeas corpus petitioner need not point to factually identical precedent]. *Id.*, at 25. The proper standard enunciated by the First and Sixth Circuits for determining when a state court decision is "contrary to" clearly established Supreme Court precedent is whether a Supreme Court rule – by virtue of its factual similarity (though not necessarily identicality) or its distillation of general federal law precepts into a channeled mode of analysis specifically intended for application to variant factual situations – can fairly be said to require a particular result in a particular case. *Id.*, at 25.

The reasoning below is also logically flawed because no subsequent cases will ever present the identical facts (A-45) and the identical issues of law (A-47). The conclusions of law by the lower courts in this case are wrong and clarification of the

point by the United States Supreme Court has ramifications far beyond the life of the instant litigation.

That a state court judge does not specifically cite a decision of the Supreme Court of the United States is not dispositive of whether the state court rejected controlling authority of the Supreme Court. A federal judge reviewing the merits of a claim by a state prisoner must consider the holding of the case, not merely the citations of authority by the state court judge. To allow a state court judge to avoid federal review by merely refusing or failing to cite to appropriate precedent as suggested by Respondent (Response, p. 9), would defeat the historical justification for federal jurisdiction in state court convictions. *See Wright v. West*, 505 U.S. 277, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992).

3. The decision below is in conflict with long standing Supreme Court jurisprudence on the Ex Post Facto Clause (Questions Presented 3, 4, and 5).

For a period of time, the provisional credit system was

used to alleviate state prison overcrowding in Florida. The provisional credit system began in 1988. § 944.277, Florida Statutes (1988). In 1989, the provisional credit system was revised to exclude inmates ever convicted of, *inter alia*, second-degree murder, the offense of conviction. 944.277(1)(i). A footnote to that subsection specifically provided that the exclusion was applicable to offenses committed on or after 01 January 1990. Mr. Cox's alleged offense was committed on 30 September 1989.

Effective on 01 September 1990, however (between the time of Mr. Cox's guilty plea and his sentencing), a new statute took effect: § 944.277 Florida Statutes. The statute had been enacted a year earlier, on 28 June 1989, several months prior to the alleged offense, but it did not take effect until 01 September 1990. The statute created the procedure termed "control release," a new method for alleviating prison overcrowding in Florida. As a practical consequence of the new system, no provisional credits under § 944.277 would be awarded to Mr.

Cox or any Florida inmate unless the Control Release Authority failed to keep the prison population under certain levels. § 947.146(3) (1989). Further, Mr. Cox's second-degree murder conviction made him ineligible for control release. 947.146(4)(f). As a result, Mr. Cox had no hope of receiving either provisional or control release credits against his sentence. Mr. Cox's attorneys were not aware of the impending change and the effective abolition of provisional credits when they advised Mr. Cox to base his decision to plead guilty on the availability of provisional credits and the effect on his sentence. (A-44).

As discussed above, the principal basis for denying Mr. Cox postconviction relief at the state level was the state court's opinion that there

> is a vast difference between an early release statute, designed to reduce prison overcrowding and gain-time statutes which relate directly to the sentence imposed. Mr. Cox ignores such differences. His alleged basis for withdrawal of his plea is predicated upon the erroneous conclusion that there is no distinction between

> them when determining whether a plea should be set aside because of erroneous legal advice on such subjects.

(A-9).

The state court continued that provisional credits are not proper factors upon which a plea bargain and sentence may be predicated because they are merely temporary mechanisms to alleviate prison overcrowding and, at most, "provide a basis to speculate upon a possible early release date." (A-9). The state court then held

> In *Dugger v. Rodrick* [584 So.2d 2 (Fla. 1991)], *supra*, the Florida Supreme Court ... held that a prisoner's eligibility for and receipt of provisional credits or other awards for reducing prison overcrowding, "regardless of what they are called" are "in no way tied to overall length of sentence" *id. at 4*. Statutes providing for such awards are "not a substantive matter of punishment or reward," *id. at 4*, and are merely procedural in nature, *which may change after sentence without* ex post facto *restrictions*. A lawyer's opinion or advice concerning such procedural matters cannot, as a matter of law, be a legal basis upon which the validity of a plea may be predicated.

(A-10-11).

As the magistrate noted in the R&R, the United States Supreme Court opinion in *Lynce* superseded the Florida Supreme Court opinion in *Rodrick*. (A-42). However, contrary to the recommendation of the magistrate, and the holding of the district court, the impact of *Lynce* on Mr. Cox's petition is relevant and significant. This is especially true in light of the Florida Supreme Court's opinion in *Gomez*, which held that the analysis used by the state court was not correct under clearly established federal law at the time of the state court proceedings.

In *Gomez*, the petitioners brought habeas corpus petitions claiming that the substitution of the Control Release Program for statutory overcrowding programs in effect at the time of the petitioner's offenses violated the Ex Post Facto Clause. *Gomez*, 733 So.2d at 500. Just like Petitioner Cox, the petitioners in *Gomez* were eligible for certain overcrowding awards (such as provisional credits at the time of their offenses, but by the time the petitioners reached the Department of

Corrections, those overcrowding awards were no longer given out because of control release. *Id.* at 500-501. The Supreme Court of Florida agreed with the petitioners based upon its interpretation of *Lynce*. The supreme court concluded that *Lynce* made it clear "that, for *ex post facto* purposes, there is no difference between regular gain time and prison overcrowding gain time." *Id.* at 504.

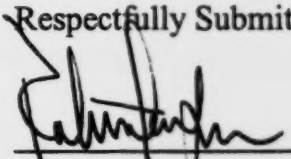
The state court reached exactly the *opposite* conclusion, and based on that conclusion, denied Mr. Cox relief. (A-10-11). "Statutes providing for such awards are not a substantive matter of punishment or reward, *Id.* at 4, and are merely procedural in nature, which may change after sentence without *ex post facto* restrictions." (A-10). The United States District Court analyzed the Florida Supreme Court decision in *Gomez* [733 So.2d 499 (Fla. 1999)] to conclude that "[b]ut for the Department's ex post facto application of a subsequently enacted statute, the lawyer's advice was essentially correct." (A-64). The district court's conclusion was flawed because the

statute was not subsequently enacted; the statute had already been passed, but was subsequently *effective*. Counsel were therefore deficient as a matter of law, contrary to the conclusions of the lower courts and *Lynce* and *Gomez* also validated Mr. Cox's claim that, like regular gain time, prison overcrowding gain time could constitute part of an inmate's sentence because a "prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Id.* at 504, *citing Lynce*, 519 U.S. at 445-46 (quoting *Weaver v. Graham*).

I. CONCLUSION

Petitioner Cox would submit the Petition presents properly preserved issues decided by the Eleventh Circuit Court of Appeals contrary to existing law in other circuits and contrary to precedent of the Court. It is respectfully submitted the petition should be granted, and the case proceed to briefing on the merits which relief is hereby requested.

Respectfully Submitted,



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Appendix to
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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR WAKULLA COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs. Case No. 89-143

CECIL COX,
Defendant

_____/

AMENDED
ORDER DENYING MOTION FOR POST-CONVICTION RELIEF

THIS CAUSE came on for hearing before the Court on Motion for Post-Conviction Relief filed by the Defendant, CECIL COX, and the Court having considered same, the State's Response thereto, and Defendant's Reply to State's Response, and having conducted an evidentiary hearing and heard testimony from witnesses for the Defendant, and argument of counsel from the respective parties, and being otherwise fully advised in the premises,

FINDS AND DECIDES as follows:

1. The Defendant was charged by indictment with Murder in the First Degree, which offense was committed on September 30, 1989. The State agreed to not seek the death penalty and the Defendant agreed to have the case tried by a six-person jury. The case was set for trial, and on the morning of the trial the Defendant, pursuant to a plea agreement withdrew his plea of not guilty and entered a plea of *nolo contendere* to the lesser charge of Second Degree Murder, a life felony, with a three-year minimum mandatory sentence for use of a firearm. The agreement provided that the sentence would be left to the Court's discretion with a minimum of seventeen years and a cap of forty years. The Defendant was questioned by the court under oath as to whether his plea was freely, knowingly, and voluntarily given. See transcript of hearing held on August 6, 1990, attached hereto. Upon finding that there was a *prima facie* case admitted to on the record, that the plea was freely and voluntarily given, and that the Defendant

had been advised of the possible sentence in the case, the Court accepted the plea.

2. The Defendant was adjudicated guilty on August 6, 1990, and came on before the court for sentencing on October 26, 1990. After a full sentencing hearing and receiving testimony from witnesses for the State and the Defendant, the Court sentenced the Defendant within the guidelines and pursuant to the plea agreement to a term of forty years in the custody of the Department of Corrections, with a three-year minimum mandatory for use of a firearm.

3. On January 29, 1993, Defendant, through counsel, filed a Motion for Post-Conviction Relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure, seeking to withdraw his plea and alleging as follows:

> Defendant's plea was entered without required understanding of the consequences of the plea. Based on the representations of his attorney, the defendant believed that by entering a plea to the charges he would serve only eight years in prison.

> The defendant was denied the effective assistance of counsel. The defense counsel failed to inform the defendant that he was ineligible for the Control Release Program and provisional credits. The defendant would serve substantially more of his sentence than the defense counsel stated.

4. Defendant filed Affidavits from his trial attorneys, one dated September 10, 1992, by Chris Christ, and one dated September 15, 1992, by Ed Harvey, Assistant Public Defender. Mr. Harvey's affidavit states as follows:

> I, Ed Harvey, Assistant Public Defender, with the Second Judicial Circuit Public Defenders Office, represented Cecil Cox in connection with the above captioned case. During our discussions about a plea agreement, I represented to Cecil Cox that he would be eligible for Provisional Credits, Section 944.277, Florida Statutes (1989), if he entered a plea to Second Degree Murder.
>
> The defendant agreed to change his plea in exchange for a recommendation from the state for a recommendation from the state for a forty (40) year sentence. I represented to Mr. Cox that, because of the Provisional Credits, he would serve approximately twenty percent (20%) of the sentence, or eight (8) years.
>
> This was a critical part of the plea discussions

with my client; without this understanding about how much time he would serve he would not have entered into this plea agreement. I learned later that Mr. Cox would not benefit from the Provisional Credits because of the Second Degree Murder conviction.

I learned that the Control Release program was enacted during the 1989 legislative session and effectively eliminated the application of provisional credits. Section 944.277 is still on the books but because of the intervention of Control Release, provisional credits are not being awarded. Inmates, like Mr. Cox who are convicted of second degree murder were eligible for provisional credits but they are statutorily ineligible for Control Release.

The difference between the sentence I described to Mr. Cox and the sentence he will serve is substantial. He can now expect to serve sixteen (16) years instead of the eight (8) years he initially expected.

I represented Mr. Cox along with attorney Chris Christ of Birmingham, Alabama. Mr. Christ was a party to almost all of the discussions regarding the plea agreement.

5. The State responded to Defendant's motion and Defendant filed a reply thereto. Based upon the allegations of Defendant's sworn motion, together with the affidavits of trial

counsel, the Court ordered that an evidentiary hearing be held as required by *Eady v. State*, 604 So.2d 559 (Fla. 1st DCA 1992). At such hearing, counsel for Defendant presented testimony from Assistant Public Defender Ed Harvey, Attorney Chris Christ, and Defendant, Cecil Cox.

6. The trial court conducted an evidentiary hearing to determine if the Defendant was induced to enter a plea as a result of his lawyer's misleading representations as to the consequences of his plea. The Court determined what statements were actually made by the lawyer and the context in which they were made, as well as other factors relating to ineffectiveness, prejudice, and voluntariness. In considering the sufficiency of the evidence the court considered the credibility of the witnesses, including the credibility of testimony by the Defendant's lawyers as to whether the plea was induced by misinformation. *Joyner v. State*, 583 So.2d 726 (Fla. 4th DCA 1991).

7. The Court, considering such testimony and

argument of counsel, finds that there were many factors that entered into Defendant's acceptance of the plea agreement, one of which was Mr. Harvey's belief that Mr. Cox would be entitled to provisional credits and that upon application of such provisional credits to his sentence he would serve approximately 20 percent of his sentence. The Court does find that Mr. Harvey's testimony that he so informed the Defendant is believable, and the Court accepts such testimony as true. The Court does not find that the Defendant would not have entered into this plea agreement but for his belief that he would only serve eight years in prison, as testified by the Defendant. Mr. Cox's testimony that the trial judge, Judge Charles McClure, guaranteed Mr. Cox, or informed counsel in private, that Defendant would only serve 20 percent of his sentence is not worthy of belief, and the Court finds that no such statement was made by the Court.

8. Prior to Defendant's entry of his plea and the imposition of sentence for Second Degree Murder, Mr. Harvey

informed the Defendant that he would be eligible for provisional credits which would reduce the length of his expected 40-year sentence. Sometime subsequent to the imposition of sentence the Department of Corrections failed to award Mr. Cox any provisional credits. It is undisputed that under the Department of Corrections' application of the existing law, Mr. Cox will likely serve a substantially longer period in prison than 8 years because of the manner in which the state has decided to deal with prison overcrowding. There is no contention that Mr. Harvey gave Mr. Cox any erroneous legal advice concerning either basic gain-time or incentive gain-time, allowable under law, which would reduce the period of time Mr. Cox would actually serve in prison on his 40-year sentence. Thus, the sole basis for the Defendant's claim of ineffective assistance of counsel relates to Mr. Harvey's advice concerning statutory provisions regulating the reduction in prison overcrowding by the early release of prisoners.

9. There is a vast difference between an early

release statute, designed to reduce prison overcrowding and gain-time statutes which relate directly to the sentence imposed. Mr. Cox ignores such differences. His alleged basis for withdrawal of his plea is predicated upon the erroneous conclusion that there is no distinction between them when determining whether a plea should be set aside because of erroneous legal advice on such subjects. Basic and incentive gain-time are quantifiable determinants of a prisoner's overall term, which are proper factors upon which a plea bargain and sentence may be predicated. Provisional release credits, or other similar statutory means designed to alleviate the administrative crisis created by prison overcrowding, are not proper factors upon which a plea bargain and sentence may be predicated. *Dugger v. Rodrick*, 584 So.2d 2 (Fla. 1991). They are merely temporary mechanisms to alleviate prison overcrowding and bear no relationship to the maximum sentence available or the ultimate sentence imposed. At most, early release procedures provide a bases to speculate upon a

possible early release date. There are many outside variables that contribute to prison overcrowding. The length of a sentence expected to be served cannot be tied to such variables or the procedural statutes dependent thereon, which are not directed toward traditional purpose of punishment. In *Dugger v. Rodrick, supra*, the Florida Supreme Court approved the decision in *Miller v. Dugger*, 565 So.2d 846 (Fla. 1st DCA 1990), and held that a prisoner's eligibility for and receipt of provisional credits or other awards for reducing prison overcrowding, "regardless of what they are called" are "in no way tied to overall length of sentence" *id at 4*. Statutes providing for such awards are "not a substantive matter of punishment or reward," *id at 4*, and are merely procedural in nature, which may change after sentence without *ex post facto* restrictions. A lawyer's opinion or advice concerning such procedural matters cannot, as a matter of law, be a legal basis upon which the validity of a plea may be predicated. A Defendant may not, as a matter of law, withdraw his plea and

have his sentence set aside, because he was incorrect in predicting his release date because of procedural considerations alleviating prison overcrowding. The fact that a defendant's belief as to his release date was predicated upon his lawyer's erroneous advice of existing procedural law does not change a defendant's rights. Proof of erroneous legal advice as to such procedural matters does not justify a finding of ineffective assistance of counsel so as to justify the relief sought by Mr. Cox.

10. Some justification for Defendant's erroneous conclusion may be found in certain opinions accompanying decisions wherein trial courts were reversed for *summarily denying* a Rule 3.850 motion such as one filed by Mr. Cox. In fact, Mr. Cox relies heavily upon *Eady v. State*, 604 So.2d 559 (Fla. 1st DCA 1992), in which the trial court was reversed for summarily denying a similar motion. In *Eady*, the Court actually referred to Eady's claim of erroneous advice concerning provisional credits and control release as a claim

pertaining to a type of "gain time" and created a new term: "provisional gain-time credits." *id at 561.* In *Eady*, the First District Court relied upon its earlier decision in *Rackley v. State*, 571 So.2d 533 (Fla. 1st DCA 1990), where it reversed a summary denial of a 3.850 motion asserting trial counsel's failure to inform him of ineligibility for statutory gain-time as an habitual offender. *Rackley* has nothing to do with provisional credits or early release to reduce prison overcrowding. In *Eady*, the Court also relied upon *Tarpley v. State*, 566 So.2d 914 (Fla. 2d DCA 1990), which dealt with a summary denial of a post-conviction motion asserting trial counsel's erroneous advice concerning *administrative gain time* and work release. "Administrative gain time" was a term used at that time to designate the procedure employed to reduce prison overcrowding. The *Tarpley* Court equated such procedures for early release to the gain time statutes then in effect and which are now still in effect. The Court held that erroneous legal "advice regarding the effect of *gain time* and

similar provisions" may undercut the voluntary character of the plea. *Id. at 915.* Similar language is contained in another opinion of the First District Court of appeal in which *Rackley* and *Tarpley, supra*, are cited with approval. In *Wright v. State*, 583 So.2d 399 (Fla. 1st DCA 1991), the Court affirmed a summary denial of a 3.850 motion because Wright did not allege that he relied upon affirmative erroneous "advice regarding the effect of *gain time* and *similar provisions* ...." *Id. at 400.* Notwithstanding such opinions which appear to equate gain time statutes to early release statutes in considering summary denials of 3.850 motions, the First District has clearly recognized the important distinction between the two. *See Miller v. Dugger*, 565 So.2d 846 (Fla. 1st DCA 1990). Although, there is some justification for Mr. Cox's argument which ignores the significant difference between gain time statutes and early release statutory processes, such apparent justification is not legally sufficient to require this Court to set aside the plea and sentence. Treating the statutes alike is

inconsistent with sound legal principles announced by the Florida Supreme Court in *Rodrick, supra*.

11. Further, there is a question as to whether Mr. Harvey in fact misinformed the Defendant. The state of the law at the time of Mr. Cox's plea and sentence appears to be entirely consistent with Mr. Harvey's opinion and advice regarding provisional credits. Mr. Cos's plea was entered on August 6, 1990, and his sentence was imposed on October 26, 1990. Mr. Cox committed the murder on September 30, 1989. Substantive law in effect on the date the crime was committed was the law applicable to the sentence. On September 30, 1989, Section 944.277, Florida Statutes (1988 Supplement), provided for provisional credits for persons who committed second degree murder on or before that date, but no such credits were awardable while serving any minimum mandatory portion of a sentence. This statute had been amended in the 1989 session of the legislature, prior to the time Mr. Cox committed the murder which is the subject of this case. By that

amendment, persons convicted of second degree murder would not be eligible for such provisional credits, if the crime was committed after January 1, 1990. The critical factor revealing the propriety of Mr. Harvey's advice is contained in the statutory provision which stated that the exclusion from entitlement to provisional credits was to apply only to offenses occurring after January 1, 1990. Mr. Cox's offense occurred prior to January 1, 1990. Therefore, under the law when Mr. Cox pled and was sentenced, specifically Section 944.277, Florida Statutes (1988 Supplement), provisional credits were awardable after serving the three-year minimum mandatory term.

12. The date of January 1, 1990, was the earliest date that a second degree murder could be committed and not qualify the Defendant for provisional credits. It was not the *ex post facto* application of Section 944.277 which has resulted in Mr. Cox serving more than his anticipated 8-year sentence. It was the legislative method of dealing with prison

overcrowding, by the enactment of the Control Release Statute, Section 947.146, Florida Statutes, which is causing Mr. Cox to serve a longer period in prison than he anticipated. The provisional credits statute is still in effect but the prison population is now being controlled by release of inmates on control release, enacted by Chapter 89-526, Laws of Florida 1989, effective September 1, 1990. Section 947.146(3) provides that there shall be no award of provisional credits pursuant to 944.277, unless control release does not maintain population below 98 percent. Cecil Cox is ineligible for Control Release pursuant to Section 947.146(4)(i), a factor not disclosed by Mr. Harvey.

13. Failure of counsel to inform a Defendant about the possible collateral consequences of his plea will not support a motion to withdraw plea under Rule 3.850, Florida Rules of Civil [sic] Procedure. In *Levens v. State*, 598 So.2d 120 (Fla. 1st DCA 1992), the Court distinguished a motion to withdraw a plea under Rule 3.170 and Rule 3.850. Under Rule

3.171(c)(2) there is an obligation on the part of defense counsel to advise the Defendant of "all" pertinent matters bearing on the choice of which plea to enter, the particulars attendant upon each plea, and the likely results thereof. Proceedings under Rule 3.850 impose a greater burden on the Defendant seeking relief in that the Defendant is required to show that counsel actively misled or misinformed him of the consequences of the plea. *Levens, supra; Simmons v. State*, 611 So.2d 1250 (Fla. 2d DCA 1992); *Wright v. State*, 583 So.2d 399 (Fla. 1st DCA 1991). Defendant has failed to sustain this burden.

14. An additional factor in Defendant's acceptance of the agreement and entering a plea to the offense of Second Degree Murder, was that, if convicted of First Degree Murder as charged by indictment, he would be subject to a possible life sentence with a twenty-five year minimum, instead of the forty-year maximum sentence, with a three-year minimum mandatory under the terms of his plea agreement. Indeed, he has avoided the possible consequence of a life sentence with a twenty-five

year minimum, and this possibility was eliminated by his plea. Regardless of the Defendant's testimony that this factor was insignificant in his decision, the Court cannot ignore such fact. The Court cannot come to the conclusion that but for Mr. Harvey's representations as to the availability of provisional credits on Defendant's sentence, and his failure to inform him that he does not qualify for control release, this plea agreement would not have been accepted by the Defendant. It is now nearly four years after the commission of the murder. A consideration of whether this case can now be proved, four years later, is not relevant to the availability of evidence at the time this plea was entered. The State was prepared to go to trial and the witnesses were present and ready to testify at the time that the Defendant decided to enter his plea to the offense of Second Degree Murder instead of subjecting himself to conviction by a jury of the offense of First Degree Murder. There was no testimony presented to this Court that would support a conclusion that the State could not have obtained a

conviction of Murder in the First Degree. This was certainly a strong motivating factor supporting acceptance of the plea to the lesser offense.

15. The Court finds, based upon all the testimony before the Court and the court file and affidavits filed incident to this proceeding, that the Defendant has not met his burden to establish that he was prejudiced by misinformation given to him by counsel to the extent that such misinformation contaminated the voluntariness of the plea, and that he would have not have entered the plea he now seeks to withdraw but for the incorrect information concerning his entitlement to provisional credits given to him by counsel. *Shell v. State*, 501 So.2d 1334 (Fla. 2d DCA 1987); *Ramsey v. State*, 408 So.2d 675 (Fla. 4th DCA 1982). The Court cannot arrive at the conclusion that the plea to Second Degree Murder with a sentence range of 17 to 40 years would have been entered only if provisional credits were available to Defendant to reduce his sentence as he now testifies. Mr. Harvey could not testify, unequivocally, that the

plea would not have been entered but for his alleged erroneous advice to the Defendant that the availability of provisional credits would reduce Defendant's sentence. This case is a perfect example of why a Defendant should be honest and straightforward in responding to the Court's inquiries in the acceptance of a plea, and why defense counsel should be candid with the Court regarding essential and elemental understandings and expectations of his client. If a plea is predicated on any matters as significant as the expectation of length of actual incarceration, or any promises thereof, this must be told to the sentencing judge or the Defendant will be estopped from later urging any relief because actual incarceration is likely to or does exceed such expected time. Estoppel is only fair and equitable because the State acts in reliance upon the finality of the sentence. As a party to a plea agreement, the State is prejudiced as a matter of law if the Defendant can set aside the agreement and the State be required to go to trial, at a later date (in this case over four years later) when the probability of

conviction is likely reduced.

It is therefore, ORDERED AND ADJUDGED that the Motion for Post-Conviction Relief be and the same is hereby DENIED.

The Defendant has the right to appeal this order within thirty (30) days from the date hereof.

DONE AND ORDERED in Chambers this 25th day of October, 1993, nunc pro tunc September 20, 1993.

/s/ L. Ralph Smith, Jr.
L. RALPH SMITH, JR., Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing order was furnished to:

Sharon Bradley
Daley & Associates
P. O. Box 1177
Tallahassee, FL 32302

Office of the State Attorney
P. O. Box 337
Crawfordville, FL 32327

this 25th day of October, 1993.

/s/ **Sharon L. Brock**
Sharon L. Brock., Judicial Assistant

DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CECIL COX,
Appellant,

v. Case No. 93-3868

STATE OF FLORIDA,
Appellee.

_____/

January 26, 1995

PER CURIAM.

See Steele v. State, 645 So.2d 59 (Fla. 4th DCA 1994); *Zaetler v. State*, 627 So.2d 1328 (Fla. 3d DCA 1993), *review denied*, 639 So.2d 984 (Fla. 1994); *Simmons v. State*, 611 So.2d 1250 (Fla. 2d DCA 1992) (on rehearing).

AFFIRMED.

ERVIN, MINER and WOLF, JJ., concur.

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

CECIL WILLIAM COX,

Petitioner,

vs. 4:96cv451-WS

HARRY K. SINGLETARY, JR.,

Respondent.

_____/

REPORT AND RECOMMENDATION

Petitioner Cox, through counsel, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction out of the Second Judicial Circuit, Wakulla County, case number 89-CF-143, for second degree murder. Doc. 1. Two volumes of exhibits were filed as docs 4 (pp. 1-66) and 5 (pp. 67-169). Referenced to those exhibits are to App.

Followed by the bottom right page number. Respondent filed a response with exhibits, doc. 9, and references to those exhibits are to Ex. followed by the letter assigned (A-O).

I. Procedural history

By indictment of first degree murder filed December 7, 1989, a grand jury charged that Petitioner,

> on or about the 30th day of September, 1989, in the County of Wakulla and State of Florida, did unlawfully kill a human being, ERIC BARBER, by SHOOTING HIM WITH A FIREARM, and the killing was perpetrated from or with premeditated design or intent to effect the death of ERIC BARBER, contrary to Section 782.04, Florida Statutes.

Ex.B. Petitioner was represented by Ed Harvey, appointed by the State of Florida, and Chris S. Christ, an attorney from Alabama retained by Petitioner's parents. Ex.C.

Petitioner initially pleaded not guilty. Doc 3, p. 2 (Petitioner's statement of facts). He agreed to have the case tried before a six-person jury and the prosecution agreed not to seek the death penalty.[2] *Id. See also* App. pp. 94, 127-128. On the morning of August 6, 1990, the day of trial, Petitioner agreed to plead *nolo contendere* to second degree murder with a firearm, a life felony with a three year minimum mandatory term, leaving to the court the determination of where Petitioner would be sentenced in a range of 17 to 40 years. App. pp. 17-18. At sentencing on October 26, 1990, nine defense witnesses were called. Ex.G, index. Petitioner was sentenced to a term of 40 years, with three minimum before eligible for parole, and was given credit for time served. Ex. G, pp. 87-88.

Petitioner filed an appeal raising one issue, that the trial judge should have recused himself form the case. Doc. 3, p. 2. The judgment was affirmed without opinion. Cox v. State, 599 So.

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[2] Thus, avoidance of the death penalty was no longer an issue for Petitioner. App. pp. 127-128.

2d 661 (Fla. 1st DCA 1992). Petitioner then sought post-conviction relief pursuant to Fla.R.Crim.P. 3.850, raising the grounds raised in this § 2254 petition. Exs. H and I. Relief was denied, and denial was affirmed on appeal. App. pp. 1-14; Ex. O. Petitioner has exhausted his state court remedies as to his two federal claims.[3]

II. Grounds raised

Petitioner asserts that his attorneys advised him that he would be eligible for provisional release credits and that he

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[3] Respondent's argument that Petitioner raised only "state law" claims of ineffective assistance of counsel is rejected. Respondent has not shown how state law as applied to a case such as this is different from federal. Further, Petitioner argued federal law in his Rule 3.850 motion. *See* Petitioner's Rule 3.850 memorandum, p.9, citing Bradbury v. Wainwright, 653 [sic, 658] F.2d 1083, 1087 (5th Cir. 1981), which held:

> If the advice of counsel falls below the minimum required by the Sixth Amendment, the guilty plea cannot have been made knowingly and voluntarily because it would not represent an informed waiver of the defendant's constitutional rights. *Mason v. Balcom*, 531 F.2d 717, 725 (5th Cir. 1976) . . . . Counsel's advice need not be the best, but it must be within the realm of competence demanded of attorneys representing defendants in criminal cases at that time. *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Ballard v. Blackburn*, 583 F.2d 159 (5th Cir. 1978).

Moreover, it is plain that Judge Smith was following federal standards for a claim of ineffective assistance of counsel as he used exactly the same language to reach his conclusions as used in controlling federal cases, discussed *infra*.

would serve only 8 to 10 years of a 40-year sentence. That advice was wrong. At the time he entered his plea, Petitioner had no reasonable expectation of receiving provisional credits. Petitioner now expects to serve 18 to 20 years through periodic awards of gaintime. Petitioner asserts that he would not have pleaded guilty if he had known that he was unable to receive provisional credits and would have to serve more than twice as long as expected. Petitioner contends that he received ineffective assistance of counsel (ground one) and that his plea was not knowing and voluntary (ground two).

III. Standard of review

This petition was filed after April 23, 1996, and the Antiterrorism and Effective Death Penalty Act (AEDPA), effective on April 24, 1996, governs this court's review. *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1977); *Neelley v. Nagle*, 138 F.3d 917, 921-922 (11th Cir. 1998) *citing Lindh*. Even though these new standards took effect after Petitioner exhausted his state court remedies, this

court must apply them. *Neelley*, 138 F.3d at 921, *citing*, *Lindh* (finding no *ex post facto* violation).

Section 2254(d), as amended by the AEDPA, provides that a § 2254 petition by a state prisoner:

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Section 2254(d)(1) concerns the court's analysis of the state court's application of Federal law.[4] Federal law on a particular subject is "clearly established" if Supreme Court

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[4] Alternatively, relief may be granted if the state court made an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Section 2254(d)(2).

precedent would have compelled a particular result in the case." *Neelley*, 138 F.3d at 923 (footnote omitted). A state court's decision is "contrary to" clearly established Federal Law where that court either reached a different decision than a Supreme Court decision on essentially the same facts, or where the state court "in contravention of Supreme Court case law, fails to apply the correct legal principles to decide a case." 138 F.3d at 923. Both are "errors of pure law," and a federal court may grant relief where the state court decided the legal issue incorrectly. 138 F.3d at 923-924.

If the state court has applied the proper law, the federal court "must then determine whether the state court's application of that law was 'reasonable.'" 138 F.3d at 924. This refers to mixed questions of law and fact, that is, an unreasonable application of Supreme Court precedent to the facts of the case. *Id.* "It does not mean that a federal court may grant habeas relief simple because it disagrees with the state court's decision. This would amount to de novo review, which congress clearly

did not intend." *Id.* An "unreasonable application of" clearly established Federal law will be found "only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists."[5] *Id.*, citation omitted.

Section 2254(e)(1) governs a federal court's analysis of the state court's findings of historic fact. That determination is guided by § 2254(e)(1), which provides that a state court's determination of an issue of historic fact is presumed correct, and the presumption may be rebutted only by clear and convincing evidence. *Ashker v. Class*, 152 F.3d 863, 867 (8th Cir. 1998); *Jackson v. Johnson*, 150 F.3d 520, 524 (5th Cir. 1998). If, however, a petition has failed to develop the factual basis of his claim in State court proceedings, §§ 2254(2)(A)(ii) and (B) limit the authority of the court to hold an evidentiary

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[5] Accordingly, § 2254(d)(1) requires that the state court's application of Federal law be analyzed in three steps. The court must first "survey the legal landscape" to determine the law clearly established be the Supreme Court at the time of the state court's adjudication. Next, it must decide whether the adjudication was contrary to that clearly established law. If it was not, the court must also determine whether the state court unreasonably applied clearly established law. *Id.* At 924-925

hearing to cases where the factual predicate "could not have been previously discovered through the exercise of due diligence" and "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

IV. Whether the AEDPA violates separation of powers

Petitioner has argued in his reply that the AEDPA violates the doctrine of separation of powers and constitutes a suspension of the writ of habeas corpus. There are only a few cases addressing this contention, and those cases reach a contrary result. *Green v. French*, 143 F.3d 865, 874-876 (4th Cir. 1998); *Barker v. Yukins*, 993 F.Supp. 592, 599-600 (E.D. Mich. 1998). *CF., Felker v. Turpin*, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996) (rejecting a suspension clause challenge to the portion of the AEDPA which limits successive habeas petitions). Thus, Petitioner's constitutional challenge to the AEDPA should be rejected.

V. The evidence presented to the circuit court and that court's findings

A lengthy evidentiary hearing was held by state Circuit Judge Smith on Petitioner's Rule 3.850 motion. Petitioner was represented by counsel. App. pp 67-168 (transcript).

Ed Harvey testified at the hearing that last minute plea negotiations occurred just prior to jury selection. Harvey said that he discussed with Petitioner the advantages of taking a plea to second degree murder rather than risking a first degree murder conviction "because of the time that would require in prison under the sentence." *Id.* p. 71. Harvey said that he advised Petitioner that he would receive provisional credits for a second degree murder conviction, and that he would probably serve 8 to 12 years of a 40-year sentence as a consequence, instead of at least 25 years (and probably the rest of his natural life) if convicted of first degree murder. *Id.* pp. 71-73, 90, 116. Harvey testified that it was assumed that the court would impose a 40-year sentence. *Id.* pp. 97, 124. Harvey said that

his advice concerning the time to be served on a 40-year sentence was only an estimate, not a promise. *Id.* p. 85.

Harvey explained that the guideline range for second degree murder was limited to 22 years, but in exchange for dropping the first degree murder charge, Petitioner agreed to increasing the guideline ceiling to 40 years. *Id.* p. 83. Harvey said that petitioner relied upon that ceiling in entering his plea. *Id.*

Harvey said that Petitioner was very reluctant to enter a plea, *id.* p. 73, and put a great deal of reliance upon Harvey's representation that he would get provisional release credits if convicted of second degree murder. *Id.* pp. 81-82. Harvey said that he, Petitioner, and Christ sat down in a room and he explained to Petitioner how provisional credits worked. *Id.* pp 90-91. He explained that with provisional credits Petitioner would do ten to fifteen percent of the sentence, rather than sixty to seventy percent, Harvey's calculation without the provisional credits. *Id.* p. 91.

Harvey said that the amount of time Petitioner would have to serve was the *only* thing they were talking about at that point. *Id.* p. 79. Harvey admitted that reduction of the charge from first to second degree was important to Petitioner because a first degree murder conviction would have required Petitioner to serve a mandatory term of 25 years. *Id.* p. 80. The fact that there was an upper limit of 40 years under the plea was also an important factor relied on by Petitioner, said Harvey. *Id.* pp. 83, 84. A life sentence would otherwise have been possible for a second degree murder conviction, as would a life sentence with a 25 year minimum mandatory term for a first degree conviction.[6] *Id.* p. 102

On six separate times in his testimony Harvey said that he thought Petitioner would have insisted upon going to trial if he had known he would not receive provisional credits. *Id.*

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[6] Co-counsel Christ testified before the circuit court that the was retained by the family to assist in Petitioner's defense, but he was not licensed to practice in Florida. *Id.* p. 107. He recalled that they had estimated that Petitioner would, in the worst case, serve about 8 years, and said that this was a big part of Defendant's decision to enter a plea. *Id.* pp. 109-110. Christ said that Petitioner primarily relied on Harvey's advice. *Id.* p. 120.

pp. 73, 79, 82, 92, 105, 106. Harvey testified: "I know he would have gone to trial." *Id.* p. 82. He admitted, however, that he was not "in [Petitioner's] mind," *id.* pp. 81, 83, 103, and admitted the obvious, that it was simply his own supposition that Petitioner would have insisted upon going to trial. *Id.* p. 105.

Harvey's legal advice as to Petitioner's eligibility for provisional credits, regardless of the length of the sentence, was technically accurate because the provisional release statute was still in effect at the time. *Id.* pp. 31-32. Harvey explained that despite such technical eligibility, under the new system (control release, which took effect after Petitioner's plea and for which Petitioner would be not eligible if convicted of second degree murder), the prison population was constantly maintained below 98 percent of capacity so there was no need to invoke provisional release credits to achieve that goal. *Id.* pp. 98-99. The court the asked Harvey:

> So it's not a matter of your affirmatively telling

> him something wrong, like you're entitled to provisional credits; it's the fact that you failed to tell him all of the consequences of this plea, that is that he – you have got a conditional release program that is going to be going into effect later on and if that keeps the prison population down below 98 percent capacity, then you will never be awarded any provisional credits?

Id. p. 99. Counsel said this was right. *Id.* On further questioning from the court Harvey said that it is not his practice to guarantee a sentence or to tell a defendant that the laws do not change, and that this advice to Petitioner was a "guesstimate." *Id.* pp. 99-102.

Petitioner testified that his attorney was ready to try the case when the plea offer was made. *Id.* p. 124. Petitioner said that he assumed he would receive a 40-year sentence. *Id.* pp. 124-125. Petitioner said that after discussions with Harvey and Christ, he thought he would serve 8 to 10 years of a 40-year sentence. *Id.* p. 125. Petitioner testified that he thought he would serve the rest of his life in prison if convicted of first degree murder. *Id.* p. 135. He said that "I'm not going to agree

to do forty straight years in prison under no conditions. I was twenty-six years old when this charge went down." *Id.* p. 136.

Counsel for Petitioner presented virtually no evidence at the Rule 3.850 evidentiary hearing concerning the merits of Petitioner's defenses to the first degree murder charge had he elected to go to trial. The following is all that there is. Harvey was asked whether he felt he had a "good trial case," and he answered that he felt that "doing ten years, taking a plea to second degree murder and then year, was much in his better interest than taking a chance of a first degree murder conviction." *Id.* pp. 74-75. Harvey said that he was fully prepared for trial that day, but he thought there was sufficient evidence to sustain a conviction for first degree murder if that had been the verdict. *Id.* pp 103-104. Co-counsel Christ explained that the prosecution had evidence that the homicide occurred in a parking lot. He said that Petitioner "had left, went to his vehicle, and picked up the rifle." *Id.* p. 115. He reasoned that because there was a pause before the killing took place, the

jury could conclude that Petitioner had developed a premeditated intent to kill sufficient to sustain a first degree murder conviction. *Id.* He said that he and Harvey had brought this to Petitioner's attention, and Petitioner was definitely concerned. *Id.* Christ was asked at a later point whether he thought the state's case was weak, and he side-stepped the question. *Id.* pp. 119-120.

In his order denying Petitioner's Rule 3.850 motion, Circuit Judge Smith found as fact that trial counsel Harvey's testimony was worthy of belief. Judge Smith found as a consequence that prior to the change of plea, Harvey in fact told Petitioner that he would serve approximately 20 percent of a 40-year sentence. App. p. 5. There is no serious dispute that this finding of fact was correct.[7]

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[7] In the answer, counsel for Respondent repeatedly referred to Mr. Harvey's testimony as to this central fact as "roll-over" evidence, e.g. doc. 9, p. 20, a rather crude term which implies that Mr. Harvey perjured himself to obtain relief for his client simply because he is a public defender. Yet Judge Smith said at the evidentiary hearing: "well, Mr. Harvey, you are probably one of the two or three Public Defenders in this circuit that enjoys the best reputation ever, not only with your professional ethics but with your trial abilities.... Now, I don't doubt for a minute anything that you have testified here today. I believe you under oath." App.

Judge Smith further found that Mr. Harvey's advice as to the length of time Petitioner would spend in prison was wrong, but that this was counsel's only error. *Id.* pp. 5-6. The circuit court found that Mr. Harvey was correct that Petitioner was eligible for award for provisional credits, but the subsequent enactment of the control release procedure was causing Petitioner to no longer have an expectation of receipt of provisional release credits. *Id.* p. 10. The court found that this failure to correctly advise Petitioner of the collateral consequences of his plea did not warrant Rule 3.850 relief. *Id.* p. 11. The court found that the Petitioners avoidance of a possible life sentence with 25 year minimum mandatory term was a significant factor in Petitioner's entering the plea. *Id.* pp. 11-12. The court reasoned:

> Regardless of the Defendant's testimony that

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p. 104. Respondent has belatedly agreed that Judge's Smith's finding of fact is not in dispute, doc. 14, but not after causing a considerable amount of unnecessary briefing on this question. Counsel for Respondent is doubly at fault, first for generating unnecessary argument that obscured the real issues in this case, and second for impugning the integrity of a fellow lawyer without a basis of fact. Counsel is admonished to refrain from such unprofessional conduct in the future.

> this factor was insignificant in his decision, the court cannot ignore such fact. The court cannot come to the conclusion that but for Mr. Harvey's representations as to the availability of provisional credits on Defendant's sentence, and his failure to inform him that he does not qualify for control release, this please agreement would not have been accepted by the Defendant .... The State was prepared to go to trial and the witnesses were present and ready to testify at the time that the Defendant decided to enter his plea to the offence of Second Degree Murder instead of subjecting himself to conviction by a jury of the offense of First Degree Murder. *There was no testimony presented to this court that would support a conclusion that the state could not have obtained a conviction of Murder in the First Degree.* This was certainly a strong motivating factor supporting acceptance of the plea to the lesser offense.

Id. p. 12 (emphasis added).

The circuit court concluded that Petitioner "has not met his burden to establish that he was prejudiced by misinformation given to him by counsel to the extent that such misinformation contaminated the voluntariness of the plea, and that he would not have entered the plea he now seeks to withdraw but for the incorrect information concerning his

entitlement to provisional credits given to him by counsel." *Id.* p.13.

VI. Legal analysis

For a period of time, the provisional credits system was used to alleviate state prison overcrowding in Florida. There was an earlier version not relevant here. The provisional credits system began in 1998. § 944.277 (1988).[1] In 1989 the provisional credit statute was revised to exclude inmates ever convicted of, *inter alia,* committing murder in the second degree. § 944.277(1)(i). A footnote to the subsection specifically provided, however, that this exclusion was only to be applicable to offenses committed on or after July 1, 1990. Petitioner committed his offense on September 30, 1989, and accordingly this revision did not apply to him. Therefore, Petitioner's attorneys were did not err in advising him that he

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[1] Ch. 88-122, §§ 5 and 92, Laws of Fla., effective June 18, 1988. For the history of the Florida Legislature's attempts to alleviate prison overcrowding by means of awarding credits against sentences, *see* Lynce v. Mathis, 519 U.S. 433, 117 S.Ct. 891, 893-95 137 L.Ed.2d 63 (1997). The Court there found unconstitutional the retroactive application of a statute resulting in cancellation of *previously awarded* provisional credits.

was *eligible* for provisional release credits at the time he changed his plea.

The error occurred in the advice concerning whether that eligibility would ever ripen into a benefit to him. Effective on September 1, 1990 (between the time of Petitioner's guilty plea and his sentencing), a new statute took effect. Fla. Stat. § 944.277. The statute had been enacted a year earlier, on June 28, 1989, several months before Petitioner committed his offense, but was not to take effect until September 1, 1990. Ch. 89-526, §§ 2 and 52, Laws of Florida (1989). That statute created a procedure termed control release, a new method of alleviating prison overcrowding in Florida. As a practical consequence of the new system, no provisional credits under § 944.277 would be awarded to Petitioner or any other Florida prisoner unless the Control Release Authority failed to keep the prison population under certain levels. Fla. Stat. § 947.146(3)(1989). Further, Petitioner's second degree murder conviction made him ineligible for control release. Fla. Stat. §

947.146(4)(f). See App. pp. 9-11 (discussing provisional credits and control release).[9] As a result, Petitioner had no hope of receiving either provisional or control release credits against his sentence. Petitioner's attorney was not aware of the impending change and the effective abolition of provisional release credits for persons like Petitioner, convicted of second degree murder.

At the time of the state court's adjudication of the Rule 3.850 motion (October 1993), the clearly established Supreme Court case law regarding ineffective assistance of counsel in the context of a guilty plea was that established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and *Hill v. Lockhart*, 467 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). Under *Strickland*, a defendant claiming ineffective assistance of counsel must demonstrate

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[9] The law which created the control release procedure contemplated that prisoners who committed offenses after October 1, 1988, like Petitioner, could be released under the control release program. Ch. 89-526, § 3, Laws of Florida (1989), adding Fla. Stat. § 921.001(11)(f). Thus, but for the offense of conviction, Petitioner would be eligible to participate in the control release program.

both professional error and prejudice to the outcome of the proceedings attributable to the error in order to obtain relief. 466 U.S. at 697, 104 S.Ct. at 2069. *Hill* applied the *Strickland* formula to claims of ineffectiveness of counsel in the context of a guilty plea, but explained that where a guilty plea is involved, the prejudice inquiry focuses on the causal effect of counsel's performance on the guilty plea process: "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 467 U.S. at 59, 106 S.Ct. at 370.

The facts of *Strickland* and *Hill* were not "essentially the same" as the facts in this case, although the facts of *Hill* were similar. In *Hill*, the petitioner claimed that he pleaded guilty based on his attorney's advice that he would be eligible for parole after service of one-third of his sentence, though as a repeat offender he was not parole eligible until after service of one-half of his sentence. 474 U.S. at 54-55, 106 S.Ct. at 368.

The Court found no need to address whether there might be circumstances under which counsel's erroneous advice as to parole eligibility might be deemed constitutionally ineffective because it found that the erroneous advice was not the cause of Hill's guilty plea. The Court noted that Hill had not alleged that absent the erroneous advice he would have insisted on going to trial, nor had he alleged any special circumstances that might show that he placed particular emphasis on parole eligibility in deciding whether to plead guilty. The Court said:

> Indeed, petitioner's mistaken belief that he would become eligible for parole after serving one-third of his sentence would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted.

474 U.S. at 60, 106 S.Ct. at 371.

Thus, the state court's decision at issue here is not contrary to a Supreme Court decision on essentially the same facts as a controlling Supreme Court decision because *Hill* was

decided upon the failure of the petitioner to allege that he would have gone to trial absent the erroneous advice from counsel. That factor is absent from the case at bar, and thus the facts are not essentially the same.

Nor did the circuit court fail to apply the legal principles enunciated in *Hill* to render its decision. Although *Hill* was not mentioned, the circuit court followed the same legal analysis used in *Hill*. It looked to whether Petitioner's attorney had committed attorney error and then it considered whether there had been prejudice to the outcome, that is whether Petitioner would have insisted upon going to trial but for the erroneous advice.[10]

The final question for this court to resolve is whether the state court applied Federal law to Petitioner's claims in an

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[10] *Dugger v. Roderick*, 584 So. 2d 2 (Fla. 1991) has been superseded by *Lynce v. Mathis*, *supra*, footnote 7. While the circuit court's reliance upon *Dugger v. Roderick* has proven to be wrong, that court did not misapply clearly established federal law since *Lynce* had not yet been decided. Moreover, *Lynce*, an *ex post facto* case, does not clearly establish" controlling Federal law as to the question of ineffective assistance of counsel or the voluntariness of guilty pleas, the constitutional claims presented here.

unreasonable manner. As to this, the circuit court made several subsidiary findings.

First, the circuit court found that there had been no showing that Petitioner would not have been convicted of first degree murder had he insisted upon going to trial. This fact is an important consideration in applying the law of *Hill* and *Strickland*.[11] This finding of fact was not an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2), because there was no significant evidence presented at the Rule 3.850 hearing as to the likelihood of an acquittal of first degree murder.

This important finding of fact must now be presumed to be correct and must be accepted by this court because Petitioner, as a matter of law, cannot rebut the presumption by clear and convincing evidence. While it may be that Petitioner

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[11] "The potential strength of the state's case must inform our analysis as a reasonable defendant would surely have taken it into account." *Ostrander v. Green*, 46 F.3d 347, 356 (4th Cir. 1995), *citing, Hill*, 474 U.S. at 59-60, 106 S. Ct. at 370-371.

could have presented such a factual case to the state court, the failure to develop the facts in state court cannot be remedied now in light of the AEDPA, 28 U.S.C. §§ 2254(2)(A)(ii) and (B). Where a petitioner has failed to develop the factual basis of his claim in State court proceedings, this court may hold an evidentiary hearing only where the factual predicate "could not have been previously discovered through the exercise of due diligence" and "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

The predicate for this court to hear new evidence has not been established. Nor can it be in light of the restrictions of the AEDPA. The factual presentation which Petitioner makes now concerning the likelihood of conviction for lesser included offenses is based upon evidence known to Petitioner through discovery prior to his plea. This was evidence which Petitioner

had available to him to present at his Rule 3.850 hearing.[12] The circuit court's second factual finding, that Petitioner obtained important benefits from his plea, is also presumed to be correct. Since the first finding must be accepted, this second finding was not unreasonable. In the absence of the plea agreement, Petitioner could have received a life sentence for a conviction of first degree murder. Petitioner expects to be released on his 40-year sentence in 18 to 20 years with gaintime. Doc. 3, p.35. A sentence of 18 to 20 years is better than no release at all and a minimum mandatory term of 25 years.[13]

Much of the argument in this case concerning provisional credits and control release credits, while important to Petitioner's subjective expectations, is irrelevant to the

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[12] The same result would probably have occurred prior to the AEDPA applying th rule enunciated in *Kenney v. Tamavo-Reyes*, 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992). Error of counsel would not have been cause for the default as there is no right to counsel at a Rule 3.850 hearing.

[13] Though of much less importance, during the first 25 years, Petitioner would not have been eligible to receive provisional credits, even if, in spite of the new control release program, such credits came to be awarded, since that program was not available to persons with a first degree murder conviction on the date Petitioner committed his offense. Fla. Stat. § 944.277(1)(a). He had a remote hope of award of provisional credits with a second degree murder conviction.

objective component of the prejudice inquiry in Petitioner's ineffective assistance of counsel claim.[14] Petitioner would not have been eligible to earn control release credits after either a conviction of first or second degree murder. § 947.146(4)(i)(1990). It did not matter whether the conviction came as a result of a jury verdict or a guilty plea. The same is true as to provisional credits. Had his lawyer given him flawless advice, Petitioner would have been told that he was eligible for provisional credits regardless of whether he was convicted of first or second degree murder, but that he had no likelihood of ever receiving such credits since that procedure had been superseded by the control release procedure for which he would not be ineligible. Petitioner would have faced that adverse condition after a conviction of first or second degree murder, regardless of whether the conviction came by trial or by a guilty plea. Thus, the only relevant *objective* consideration

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[14] *Ostrander v. Green*, 46 F.3d at 355 and n. 12 (while the *Hill* prejudice prong focuses on the subjective intent of the defendant, *Strickland* ultimately demands that the issue of prejudice be determined by objective criteria).

for determining prejudice to the outcome (the likelihood that a reasonable defendant in Petitioner's position would have insisted upon trial on the first degree murder charge had his lawyer given correct advice) is the probable sentencing difference between firs and second degree murder. And that sentencing consequence is determined entirely, as far as this court can tell, from the state sentencing guidelines and the expectation of earlier release through accumulation of ordinary gaintime credits.

Had Petitioner shown as fact at his Rule 3.850 hearing that he had a significant chance of being convicted of second degree murder, his claim in this court would be on an entirely different footing. With gaintime, Petitioner would have served approximately 50% less of the 18 to 20 years he now predicts he will serve on his 40-year sentence. Petitioner's claim that but for his attorney's erroneous advice he would have insisted upon going to trial would, therefore, have been much stronger had he shown that he had a good chance of second degree

murder conviction (or conviction of a lesser offense). But that showing was not made and, because of the AEDPA, cannot be made in this court.

For these reasons it is concluded that the circuit court's decision finding that Petitioner's ineffective assistance of counsel claim failed the "prejudice" prong of *Hill* and *Strickland* was not an "unreasonable application of" Federal law which had been clearly established in those cases. Having failed to convince Judge Smith that he had some viable defense to the first degree murder charge which would have resulted in acquittal or conviction of a lesser offense, Petitioner cannot show that no reasonable defendant in his position would have pleaded guilty, but would have insisted upon going to trial. Petitioner presented no evidence to show a likelihood of a verdict other than guilt of first degree murder, and he obtained some benefits from his plea to second degree. Judge Smith's decision on these points was not "so clearly incorrect that it would not be debatable among reasonable jurists." *Neelley*, 138

F.3d at 924.

It must follow from this that the state court's legal conclusion that the plea was not invalid as involuntary or unknowing due to counsel's ineffectiveness or otherwise (ground two) fails for the same reasons. Accordingly, this petition for a writ of habeas corpus should be denied.

It is therefore respectfully RECOMMENDED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging Petitioner Cox's conviction out of the Second Judicial Circuit, Wakulla County, case number 89-CF-143, be DENIED WITH PREJUDICE.

IN CHAMBERS at Tallahassee, Florida, this _____ day of November, 1998.

WILLIAM C. SHERRILL, JR.
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

A party may file specific, written objections to the proposed findings and recommendations within 15 days after

being served with a copy of this report and recommendation. A party may respond to another party's objections within 10 days after being served with a copy thereof. Failure to file specific objections limits the scope of review of proposed factual findings and recommendations.

It must follow from this that the state court's legal conclusion that the plea was not invalid as involuntary or unknowing due to counsel's ineffectiveness or otherwise (ground two) fails for the same reasons. Accordingly, this petition for a writ of habeas corpus should be denied.

It is therefore respectfully RECOMMENDED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging Petitioner Cox's conviction out of the Second Judicial Circuit, Wakulla County, case number 89-CF-143, be DENIED WITH PREJUDICE.

IN CHAMBERS at Tallahassee, Florida, this 30th day of November, 1998.

/s/ William C. Sherrill, Jr.
WILLIAM C. SHERRILL, JR.
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

A party may file specific, written objections to the

proposed findings and recommendations within 15 days after being served with a copy of this report and recommendation. A party may respond to another party's objections within 10 days after being served with a copy thereof. Failure to file specific objections limits the scope of review of proposed factual findings and recommendations.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CECIL WILLIAM COX,
Petitioner,

v. 4:96cv451-WS

MICHAEL MOORE,
Respondent.

ORDER DENYING PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS

Before the court is the magistrate judge's report and recommendation docketed November 3, 1998. *See*

[FILED
OFFICE OF THE CLERK
U.S. DISTRICT CT.
NORTH DIST.,FLA.
Entered on docket 3-25-99 BY td
TALLAHASSEE, FLA
Rules 58 & 79(a) FRCP or 32(d)(1) & 55 FRCRP
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Copies mailed to: Harper, Menser]

Doc. 18. The magistrate judge recommends that the petitioner's petition for writ of habeas corpus be denied.

I.

Petitioner, Cecil William Cox ("Cox"), pleaded *nolo contendere* to second degree murder on August 6, 1990. The indictment charged that, on or about September 30, 1989, Cox shot and killed Eric Barber with the premeditated design or intent to effect such death. Cox was sentenced on October 26, 1990, to imprisonment for a term of forty years.

On July 1, 1988, Florida's Provisional Credits statute became effective. Fla. State. § 944.277 (1988). This statute, which was in effect at the time of Cox's offense and which remained in effect through June 16, 1993, was the third in a series of gain time statutes enacted by the Florida Legislature to reduce prison overcrowding. The Provisional Credits statute provided that, with certain exception not relevant here, the Secretary of Corrections could grant up to sixty (60) days of provisional credits equally to each inmate who was earning

incentive gain-time. Fla. Stat. § 944.277(1) (1988). Cox was an eligible participant under the Provisional Credits statute.

On September 1, 1990, a year after Cox's crime was consummated, another overcrowding gain time statute – the Control Release Program – became effective. Fla. Stat. § 947.146 (1989). Cox was not offense-eligible under the Control Release Program. Although he was statutorily eligible for gain time awards under the Provisional Credits statute when he was committed to custody, and although he remained eligible for provisional credits for as long as the statute was in effect, it appears that he received no provisional credits because the Department of Corrections (the "Department"), in effect, substituted the Control Release Program for all prior programs, including the Provisional Credits program.

Some similarly-situated inmates – who, like Cox, did not receive provisional credits despite their eligibility under the statute – challenged the Department's practice of apply the provision of the Control Release Program to inmates whose

offenses were committed before the Control Release Statute was enacted. Indeed, in a recent decision, the Florida Supreme Court announced that application of the more onerous Control Release Program to inmates who committed offenses when a less onerous overcrowding statute was in effect results in an *ex post facto* violation. *See Gomez v. Singletary*, 1998 WL 892663 (Florida. Dec. 24, 1998). In *Gomez*, the Florida Supreme Court found that, ut the Department's *ex post facto* application of the Control Release Program, Gomez along with four other petitioners would have received credits and, accordingly, reduced sentences given actual levels of prison overcrowding during the relevant years. *Gomez*, 1998 WL 892663 at *2 (noting that, between July 1, 1988, and January 18, 1991, overcrowding in Florida's prisons resulted in the award of a total of 1860 days of provisional credit to eligible inmates). The supreme court said:

> By retrospectively subjecting the petitioners to the more restrictive eligibility requirements of the subsequently enacted Control Release

> program, the State effectively repealed the prior programs in effect at the time of the petitioner's offenses and severely curtailed the availability of such credits to the petitioners, in violation of both *Weaver* [450 U.S. 24] and *Lynce* [519 U.S. 433]. The state must now rectify its error.

Gomez, 1998 WL 892663 at *9 (ordering the Department of Corrections to apply the overcrowding statute in effect at the time of each inmate's offense).

II.

In his petition for writ of habeas corpus filed with this court, Cox raises a claim of ineffective assistance of counsel. He unsuccessfully raised the same claim in state court on a motion for post-conviction relief. Cox does not here, and apparently did not in state court, challenge the Department's failure to award him provisional credits. Although Cox may receive some relief under *Gomez*, that issue is not before this court.

The issue that is before this court is whether Cox's lawyer provided ineffective assistance when, during plea

negations, he advised Cox that he (Cox) would be eligible to receive provisional credits that would reduce the amount of time he would serve for second degree murder. But for the Department's *ex post facto* application for a subsequently enacted statute, the lawyer's advice was essentially correct. As the magistrate judge correctly concluded, Cox has not demonstrated that his lawyer provided ineffective assistance.

Accordingly, it is ORDERED:

1. The magistrate judge's report and recommendation (doc. 18) is hereby ADOPTED and incorporated by reference in this order of the court.

2. Petitioner's petition for writ of habeas corpus under 28 U.S.C. § 2254 (doc. 1) is DENIED with prejudice.

3. The clerk shall enter judgment accordingly.

DONE AND ORDERED this 24th day of March, 1999.

/s/ William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

CIV 31
(Rev 5/83)

JUDGMENT IN A CIVIL CASE

United States District Court	Northern District of Florida
Case Title: CECIL WILLIAM COX v. MICHAEL MOORE	Docket Number 4:96cv451-WS Name of Judge or Magistrate Judge William Stafford, Senior Judge

☐ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict

X Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate judge) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED	
That Petitioner's petition for writ of habeas corpus under 28 USC 2254 is denied with prejudice.	
ROBERT A. MOSSING, CLERK By Deputy Clerk: Teresa L. Dean /s/ Teresa L. Dean	March 25, 1999

[OFFICE OF THE CLERK
ENTERED ON DOCKET March 25, 1999 BY
U.S. DISTRICT CT.
(Rules 58 & 79(a) FRCP or 32 (d)(1) and 55 FRCRP)
NORTH DIST., FLA.
99 MAR 25 AM 9:31
TALLAHASSEE, FLA.
FILED]

Copies mailed to:
Robert A. Harper, Esq.
Mark C. Menser, Esq.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-1144-E

[FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 02 1999
THOMAS K. KAHN
CLERK]

CECIL WILLIAM COX,

Petitioner-Appellant,

Versus

MICHAEL W. MOORE, Secretary,
Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Florida

ORDER:

Appellant's motion for certificate of appealability is GRANTED on the following issues only:

(1) whether counsel was ineffective for having

advised appellant at the time he entered his plea that he would only serve 8 to 10 years of his 40-year term, and

(2) whether appellant's plea was knowing and voluntary

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-11440-E
Non-Argument Calendar

D.C. Docket No. 96-00451-4-CV-WS

[FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 28 2000
THOMAS K. KAHN
CLERK]

CECIL WILLIAM COX,

Petitioner-Appellant,

versus

MICHAEL W. MOORE, Secretary,
Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Florida

(August 28, 2000)

Before DUBINA , BLACK and MARCUS, Circuit Judges.

PER CURIAM:

This is an appeal from the district court's judgment denying petitioner/appellant Cecil William Cox's ("Cox") petition for writ of habeas corpus brought under 28 U.S.C. § 2254. As framed by Cox, the following issues are presented for appellate review: (1) whether the state court's order denying Cox's post-conviction relief was "contrary to" clearly established federal law as established by the United States Supreme Court; (2) whether the state court order denying Cox's post-conviction relief unreasonably applied clearly established federal law as established by the United States Supreme Court; and (3) whether Cox's guilty plea was voluntary, knowing and intelligent because it was based upon the misadvice of counsel as to the total length of time Cox would have to serve under a 40-year sentence.

"In reviewing a petition filed under 28 U.S.C. § 2254,

we presume that factual findings made by a state court are correct. We review factual conclusions made by the district court under the clearly erroneous standard. We review mixed questions of fact and law *de novo*." *Hamilton v. Ford,* 969 F. 2d 1006, 1010 (11th Cir. 1992)(citations and footnote omitted). An ineffective assistance of counsel claim is a mixed question of law and fact, subject to *de novo* review, while underlying factual findings of the district court are presumptively correct unless clearly erroneous. *See Glock v. Moore*, 195 F. 3d 625, 634 (11th Cir. 1999).

After reviewing the record in this case, we agree with the magistrate judge and the district court that Cox is entitled to no relief on his claims. Accordingly, we affirm the district court's judgment denying habeas corpus relief based upon the well-reasoned report and recommendation of the magistrate judge filed on November 30, 1009, and the district court's order adopting the magistrate judge's report filed on March 24, 1999.

AFFIRMED.